United States Circuit Court of Appeals

For the Ninth Circuit

No. 3952

GREAT NORTHERN RAILWAY COMPANY, a Corporation, and BELLINGHAM BAY IMPROVEMENT COMPANY, a Corporation,
Appellants,

vs.

ALBERT R. McPHEE and FRANCIS McPHEE,
Appellees

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

BRIEF OF APPELLEES

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STATEMENT OF THE CASE

The facts upon which this cause is predicated will be found concisely and accurately stated in the decision of the District Judge (Rec. 212-221). All

the detail of the first sixty-five pages of Appellant's brief, are epitomized in that decision; not a material fact missing, and each conformable to the evidence. However, appellant has injected much comment and argumentative matter it may be necessary to notice when combatting its deductions.

The prime facts, of settlement by Cole, who was succeeded by O'Donnell, who was succeeded by Thurston, who was succeeded by Beebe, who was succeeded by McPhee, thru a consecutive chain of grants, are not in dispute. The fact that Thurston transferred the O'Donnell settlement to Beebe is conclusive, for each transaction was followed by each taking possession, and making their filings conformably to their trade. That both Thurston and McPhee claim thru O'Donnell is quite certain.

Thuston made application to enter his land Feb. 6th, 1906 (R. 164); Beebe filed Feb. 6th, 1907, relinquishhed Sept. 23rd, 1909; McPhee filed Sept. 25th, 1909; succeeding Beebe. Beebe failed to show his succession from Thurston; Thurston in turn never innformed the Land Department he had transferred to Beebe.

During the period from July, 1910, to the passing of patent to Thurston in 1912, the Land Depart-

ment had both claims pending before it. The claims of McPhee to priority over Thurston were uncontradicted, and undisputed. The Land office disposes of these by saying McPhee "did not protest Thurston's claim for allowance." (R. 81.)

The land sought by Thurston was entirely separate from McPhee's. No one has ever disputed the fact that the actual situs of the land claimed by McPhee, is the identical land entered by O'Donnell, or that the land occupied by O'Donnell was the identical land transferred by Thurston to Beebe, and on to McPhee.

The question resolves itself to this: Shall McPhee be penalized and deprived of his honest purposes, because Thurston represented himself as owning rights to which he had no claim at the time he submitted his proof.

Nor can we believe the evidence given in the Thurston hearing, an exparte proceeding, conclusive against the rights of strangers, or decisive of a question of fact as against strangers, or preclude the right of witnesses to subsequently show they were misled to speak of a different piece of land than the one effected. This applies equally to O'Donnell himself; when approached for an affidavit, not knowing the

description of the land, he fell in with the paper presented to him as containing the description by survey.

When, however, he is called for detail of facts, he says he does not know the numbers of the new survey, but what he sold to Thurston was what he actually settled upon and nothing else. There are no irreconcilable discrepancies in any of the witnesses; those whom appellants are quoting—Leavitt; Smith; Steiner; and Thurston—were all available to appellant at the trial—but not called; Thurston was on the stand for the appellant, (R. 261), and was questioned about respondent's residence, but made no denial of having sold to Beebe, and had made use of the cabin of O'Donnell after parting with its ownership, for proving his homestead entry.

THE FACTS BY STEPS.

The logical order of this cause is the historical steps taken in the order of their occurrence.

The first step was taken by C. C. Cole, who employed the witness Small to erect a dwelling on the land with the declared intention of making a homestead. This was in August, 1901. (R. 234.) Cole sold the improvements to O'Donnell in October, 1901,

who at once settled on the land intending to acquire it as a homestead. He finished the cabin, posted notices on the land and house describing the land (as accurately as practicable) and declaring it to be his homestead. He built a house, ate and slept there, cleared some land, and expended money and established a residence (Rec. 245; R. 140; and lived there in 1902—Id, and 1903, R. 141); his cabin was furnished very comfortably for a homestead (Rec. 144, 145, he established a residence Id 147, 149, 150, O'Donnell was occupying the land as a settler, residing there on the day the Railroad Company made its selection R. 152, it was his home Id 236. The notices described the land as in Sec. 11 (old survey) R. 241). It was occupied in 1904 Id 244 as a homestead.

That O'Donnell settled on this land and resided on it for the purpose of making it a home, under the homestead laws, is beyond doubt. That his settlement was prior to the selection by the Railroad Company is as certain as the dates in the calendar; that he was living there at the time the selection was filed is not questioned; that his settlement was alive in 1904 is equally true.

The land was subject to settlement and his settlement took it out of the classification of Public Land.

LAND WAS NOT OPEN TO SELECTION.

Unreserved land, the title to which rests in the United States, whether surveyed or unsurveyed, is subject to entry for purpose of settlement. Prior to 1880, the rights of the settler date from filing of a declaratory statement with registrar and receiver of the local land office, but since 1880 the rights of the entrymen date from the time of settlement. This difference of time does not alter the principle announced by the Supreme Court in this language:

> "In no just sense can land said to be public lands after they have been entered at the land office (settled upon) and a certificate obtained. If public land before the entry, after (settlement) it is private property."
>
> *Wisconsin Etc. R. R. Co. vs. Price* 133 U. S. 506.

Where one has established settlement and erected a dwelling and maintained his possession, he initiates an inceptive right which was the commencement of title.

Choteau vs. Pope, 12 Wheat, 588.

Hoofanale vs. Anderson, 7 Wheat, 212.

Applied to the case at bar, the settlement of O'Donnell and respondents grantors withdrew the land from entry or settlement by any other, and se-

gregated the quarter section from the public domain. The legal title remained in the government but as against all others, except the United States, they were the lawful possessor clothed with an inceptive title.

Sturr vs. Beck, 133 U. S. 547.

Bunker Etc. Co. vs. U. S. 226, U. S. 550.

Upon this inceptive title they could maintain suits in equity, or actions at law to obtain redress for a violation of possessory rights, they might "treat the land as their own."

Russian American Packing Co. vs. U. S. 199, U. S. 577.

Shiber vs. U. S. 159 U. S. 497.

Gauthier vs. Morrison 232 U. S. 457.

With this right of title attaching and living in the entrymen from the date of his settlement, and surviving in his heirs and grantees, we advert to the statute upon which the defendants claim is based. This statute gives the defendant the right *"to select from the public land of the United States, an equal quantity of land not reserved, and to which no adverse right or claim shall have attached or been initiated at the time of making such selection."*

Act Aug. 5, 1892, 27 Stat. 390.

The grant of this statute carries two limitations, *first* the Railroad Company could not select land to which any adverse right had been initiated; *second* the land department could not bestow or grant land to the Railroad Company, on its selection to which an adverse right had attached or become initiated: It was no more in the power of the Secretary of the Interior to convey the ownership of this land to the Railroad Company by issuing a patent, than it was in the Railroad Company to select the land in the first place.

If the language of the Supreme Court in the cases cited in our brief mean anything at all, it is that thing; we let that meaning be the guide to our conclusions.

If the land, by virtue of a settlement "was not subject to selection by the Railroad Company," the proceedings in the land department could not make it so. If it ceased to be *public land* by reason of the settler having initiated a homestead, and was not subject to selection by the Railroad as lieu land for the same reason, it was open to filing by the settler, and the officers of the Land Department erred in refusing such filing. It erred in holding the land subject to selection.

Ard vs. Brandon, 156 U. S. 537.

Svor vs. Morris, 227 U. S. 524.

Osborn vs. Frayseth, 216 U. S. 571.

The initiated homestead attaching prior to the selection, thwarts the attempt, and bars afterward the effort to select. Such land never does become subject to selection as against the settler—or subsequent settlers if the first abandoned; for the very good reason it could not be extended to include such land in any event.

Hastings Etc. R. R. vs. Whitney 132 U. S. 357.

Kansas Etc. R. R. vs. Dunnmeyer 113 U. S. 629.

N. P. R. R. vs. Trodick 221 U. S. 209.

"The decisions of the Land Department on questions of law, are not binding on this Court in any sense."

Hastings Etc. R. R. vs. Whitney, supra.

That a settler may sell his improvements and clear the way to his successor is well established.

In the Donohue case, one Hickey had settled upon unsurveyed land, subsequently, and prior to survey the St. Paul M. & M. Ry .Co. made indemnity selection under the same statute, and claim involved at

bar, not only upon the particular tract upon which Hickey had placed his improvements and established residence, but "upon all the unsurveyed land contiguous thereto, which under any contingency could have been acquired by Hicky in virtue of his settlement." Substitute the name of Hicky for O'Donnell and dates of filing, and the case at bar is before us.

A contest in the Land Department resulted in recognizing Hicky as having initiated a right which upon his death passed to his heirs, who filed a declaratory statement. Shortly afterward the heir relinquished in favor of Donohue, who filed under the timber and stone act. The Department rejected this application and finally awarded patent to the railway company on its selection. Donohue sued:

> "The ruling rejecting the Donohue claim and maintaining the selection of the railway company, was erroneous as a matter of law; since by the terms of the act of August 5, 1892, c. 382.27. Stat. 390, the railway company was confined in its selection of indemnity lands to lands non mineral, not reserved 'and to which no adverse right or claim shall have attached or have been initiated at the time of making such selection.' When the selection and supplemental selection of the railway company was made the land was segregated from the public domain, and was not subject to entry by the railroad company."

St. Paul Man. & Man. Ry. Co. vs. Donohue, 210 U. S. 21-40.

The question came again before the court where the facts show, the Ry. Co .in 1883 filed an indemnity selection, but neglected to comply with regulations of the Land Department, and the selection was rejected; it remained pending in the Department by successive appeals until October, 1891, when it was finally rejected.

Another selection of the same land was filed which on March 29, 1897, was approved by the Secretary of the Interior and the tract certified under the grant, the certification being treated as the equivalent of a patent. In 1888, and while the first selection was pending, claimants' occupancy was begun and was continuous and covered the interim between the rejection of the first and filing of the second selection:

> "Following the final rejection of the first selection there was an interval of six days in which the land was open for settlement under the homestead laws. So there can be no doubt that by his residence and occupancy during that interval he initiated and acquired a homestead right. He was not disqualified by reason of what he had done before and of course it was not necessary that he should go through the idle

ceremony of vacating the land and then settling upon it anew * * * The second selection came after his homestead right had attached and therefore was subordinate to it * * * as between conflicting claims to public lands the one whose initiation is first in time is to be deemed first in right * * * but it is contended he lost his claim by not asserting it in due time at the local land office. It is true the Act of May 14, 1880, 21 Stat. 141 c. 89 sec. 3 fixed three months from the date of settlement within which the claim should be asserted at the local land office and *defendant did not conform* to this requirement, but *that is not a matter of which advantage can be taken* by one who stands in the shoes of the railway company. * * * The statute does not contemplate such a default shall inexorably extinguish the settler's claim, but only that the land shall be awarded to the *next settler* in order of time who does so assert his claim; * * * A failure. to file an application within three months after settlement forfeits the claim to the next settler in order of time, but such a default is not one that can be taken advantage of by a railway company; we regard that ruling as resting upon a proper conception of the statute, * * * Had the real facts been disclosed—viz: that defendant was residing upon and occupying the land, in virtue of a lawful homestead settlement, antedating the selection, it would have been the duty of the Secretary of the Interior to disapprove the selection * * * but the real facts were not disclosed. On the contrary, it was claimed and alleged by the agent, in making the selection, that the land was then vacant and unappropriated, and on that representation the

> Secretary's approval was given. Thus the title was wrongfully obtained by one who was not entitled to it, and another who had earned the right to receive it was prevented from obtaining it, when subsequently he came to assert his right before the Land Department."

Svor vs. Morris 227 U. S. 524-529.

Another conflict arising from the same selection last mentioned, the settler's application for a homestead entry was rejected on the same grounds, but after appeal taken by the settler, and the Secretary of the Interior pointing out the affidavit was defective; and after the court had discussed that feature as raised too late to diminish the settler's right it is said:

> "But assuming that the application in its then form was defective, it is of no legal consequence in determining the validity of the title of the planitiff in error. This was a plain common law action of ejectment. Plaintiff must recover if at all on the legal title. The plain effect of the settlement made upon the land here in controversy before any valid selection of the same land by the railroad company under its grant, was to initiate a homestead right. That settlement and possession continued from the time it was first made and when * * the railroad or its successors attempted to select that land as indemnity land, the land in question was in the actual occupancy of Froyseth, claiming it as a homestead. *It had by such settlement been segregated from the land subject to selection,*

> and in a contest between such a homesteader and those claiming under selections subsequently made of lieu lands, the claim of the former is the better claim. * * The rights of one settling in good faith for the purpose of claiming a homestead, relates back to the date of settlement. * * * It is urged that the mere fact that there was no record evidence of a homestead claim when the selection was made, was enough to give efficiency to that selection and vest the legal title under the patent thereafter issued. But this is answered by what we have already said namely, *that if at that date this land was actually occupied by one qualified under the law, who had entered and settled thereon before that time, with the intent to claim it as a homestead, the land had ceased to be public land and as such subject to selection as lieu land.*"
>
> *Osborn vs. Froyseth* 216 U. S. 571-576.

Lands granted to railroads, whether classified as lands in place or as lieu lands exclude from those in place, and preclude taking in lieu, any land, where "either pre-emption or homestead rights have attached or been initiated."

> "It was not the intention of Congress to open a controversy between claimants and the railroad company as to validity of former claims; it was enough that the claim existed."
>
> *Whitney vs. Taylor,* 155 U. S. 85.

It was not necessary appellants had notice of the homestead entry. That fact the selecter must de-

termine at his hazard. Though he search and does not find, he gains nothing for his innocence. If the land is occupied ever so obscurely, the selector must yield; the occupant may have his residence in a hollow log, and his particular 160 acres lie in four directions from the residence. The quantity has been "attached" by an "initiated" homestead; all subsequent attempts to take must beware. Where public lands have been "entered" regardless of the form of entry pursued, so long as the means were lawful, they become segregated.

> "The rule is well settled by a long course of decisions, that when public lands have been opened to private settlement, a person who complies with all the requisite necessary to entitle him to a patent, is regarded as the equitable owner, and the land is no longer open to location. The public faith has become pledged to him, and any subsequent grant of the same land to another is void."
>
> *Wirth vs. Branson* 8 Otto, 118. 25 Law Ed. 86-87.

All these cases are resolvable on the proposition that lands to which initiated rights had attached were "open as matter of law" and not subject to the grant if in place, or to selection as lieu, though the occupancy was not known at the time. Further, the granting of a patent in either, created a trust in which

the settler was *cesti qui,* and the patentee, trustee. This is the very language of

Svor vs. Morris, Supra.

Ard vs. Brandon 156 U. S. 537.

Appellants weave themselves into the belief Thurston and McPhee were contestants; parties to the same proceedings conducting a trial before the Land Department, over disputed interests.

No such controversy arose—neither was in any way disputing the other. Neither sought any land sought by the other.

The only thing that happened was Thurston proved the entry of O'Donnell to carry a claim to lands not entered by O'Donnell—disclaiming all claim to any part of what O'Donnell had actually entered.

These things are shown by proceedings in the Land Department.

Omitting mention that *Thurston was neither owner of the improvements nor seeking their situs;* Appellees were not parties to the proceedings.

IN THE LAND DEPARTMENT

The extent to which the Court goes in reviewing proceedings in the Land Department is thus stated:

> "It is only when those officers have misconstrued the law applicable to the case as established before the department, and thus have denied to parties rights which, upon a correct construction, would have been conceded to them, or, where misrepresentations and fraud have been practiced, necessarily affecting their judgment, that the courts can, in proper proceeding, interfere and refuse to give effect to their action * * And where fraud and misrepresentations are relied upon as grounds of interference by the court, they should be stated with such fullness and particularity as to show that they must necessarily have affected the action of the officers of the department."
>
> *Quinbey vs. Conlan,* 104 U. S. 420.

Putting ourselves within this rule, not wishing to depart from it, are we bound by the argument that because the Thurston case had been referred to in a brief submitted by Mr. Cannon, we thereby became bound as parties to that action? The statement of the proposition ought to be its answer. Mr. Cannon was simply asking that the evidence produced in the Thurston case had established the entry of O'Donnell and created a prior right over the railroad selection, and inviting the department to hear evidence of the

witnesses as to the actual location and ownership of the initiated right.

He was asking that witnesses be heard to show the true location of the situs of the controversy—the location of the improvements. It was true witnesses had testified such buildings were upon the N. W. ¼ of Sec. 12, but they had not testified they were upon subdivisions claimed by Thurston.

It was the possession and occupancy of the improvements that carried the right to acquire the land.

THURSTON'S CLAIM NOT A CONTEST WITH RESPONDENTS.

The fallacy of the reasoning is pointed out by reference to a case where the principles parallel; though involving mining locations, no distinction can be made in the principles discussed. Claimants to a mining lode had waged a contest with the government and received a patent; it is held such contest and patent were not binding upon a claimant asserting prior rights. This language is used:

> "A judgment is binding upon the parties to the proceeding in which it is rendered and upon their privies. The parties to the judgments

of the Land Department by which it allowed the entries of the lode claims in the case of the gold mining company were the United States and the owners of those claims. No other parties had or claimed any interest in the land at the time those entries were made. The judgments and the patents accordingly bound and estopped these parties and their subsequent assignees. They estopped all parties who initiated claims * * * under either of the parties to the proceeding subsequent to the judgments of the Land Department * * * Two of these parties, the lode claimants and the United States, were parties to the proceedings, and were estopped by the judgments and the patents. One of them was not a party to any of the proceedings, to the judgments, or to the patents, and upon familiar principles, was neither bound by them nor estopped by them from presenting and proving according to the established rules of evidence in trials under the common law, the fact that no discoveries had been made on the lode claims before the location of its tunnel site, the fact essential to the validity of its claim upon and interest in the land. * * * Not only was the claimant of the tunnel site not a party to the proceedings in the Land Department * * * but it was neither required to become such a party nor to submit its claims and interests in the lands to the adjudication of that department at that time."

Unita Tunnel Co. vs. Creede, Etc. Co., 119 Fed. 164-167.

This rule, announced by Judge Sanborn, at Circuit, was taken to the Supreme Court of the United

States, where the case was affirmed, the parties being reversed.

196 U. S. 337; 49 L. Ed. 501.

That property rights are lost in an action to which the owner is not a party has so long been condemned by our civilization, we do not believe an exception exists in behalf of a ruling of the Land Department.

THE EVIL OF SUCH A RULING

To permit such ruling is to say that a thief may steal your purse, exhibit it to a judge, make oath it belongs to himself, and tell the owner, "Since I have shown this and claimed it, without saying anything about who it belonged to, you have no right to it." That is the ultimate logic of appellant's argument, but we do not believe the court can send it out as a good precedent to follow.

If there had been a contest between parties before the Land Department where the issue was "Who owns the improvements?" and each side had called witnesses and cross-examined, the ruling might hold with defendants' contention, and as between them be final; but would it prevent a stranger from showing

neither of the parties were right? Or, coming closer, suppose after ruling made but while the jurisdiction attached, it is shown absolutely that the losing party in truth owned the subject matter and was in possession; and hearing, and admitting its truth, still adhere to the error? These are the questions in this record. While the cases of both Thurston and respondents were pending in the Land Department, proof was presented uncontradicted fixing the location and ownership of O'Donnell's improvements. It was the plain duty of the department to order an investigation to see who owned the improvements and where located, and that by the proper examination of witnesses; affording witnesses the opportunity of correcting discrepancies in affidavits and previous statements, where apparently contradictory statements had been made.

As the record stands, no juggling of words; no garbling of testimony; no mingling of logic and sophistry obscures the facts of O'Donnell's entry, under Cole, O'Donnell conveyance to Thurston; he to Beebe, and the latter to respondents. After parting with the entry Thurston made claim to distinct land; he indicated his grantee's rights as his own to procure title to such distinct lands; of these doings re-

spondents were ignorant; and not party; they had acted in good faith; taken all possible steps in the Land Department; and been denied the right of homestead because the department decided not to correct the error.

The claim that respondents would be bound by the testimony in the Thurston case, or be under the necessity of protesting Thurston's claim, could only rest upon the assumption that the notice given by Thurston of his intention to make final proof bound the world, and bound respondents. The vice of the argument lies in the fact that Thurston's notice did not affect any portion of the land sought, occupied or claimed by respondents, nor did it disclose that he was seeking to appropriate to himself the benefits and advantages springing from their property. The same may be said of the field investigation. We take it "field investigation" means that some agent of the Land Department visited Thurston's premises. If he did do so, and went searching for the original improvements upon which the validity of the O'Donnell entry rested, he found living therein these respondents. It is an uncontradicted fact they were residing upon and using the O'Donnell house at the very time Thurston was making his proof, and this "field in-

vestigation'' was taking place. Further, the strongest possible testimony it was within the power of anyone to bring to the Land Department was the rights springing from actual possession. A proper investigation would have revealed this possession, would have shown the O'Donnell improvements forty rods away from Thurston's claim. It was a fact the Land Department could not ignore, nor wipe out of existence by a mere fiat, or blindly refusing to see. Its attempt to do so is error. Evidently this field investigation had reference to whether there had been an original settlement made by O'Donnell without regard or attempt to define the subdivision upon which the improvements existed. Equally potent is the statement of O'Donnell that he did not know the lines of survey as they were finally located on the ground, but he did know and all he attempted to do was to assign to Thurston the rights to the ground which he in fact occupied, be their sectional subdivisions what they may. The exparte affidavit which he makes for Thurston is readily understandable from the fact that he was simply trying to confirm the sale which he had made to Mr. Thurston, no doubt believing, on the latter's presenting testimony to the Land Department, that Mr. Thurston was seeking to obtain the

same lands which O'Donnell had occupied; *ignorant of the fact that Thurston was not seeking that property*

IV.

It is quite true that respondents seek their title here, upon the ground that a homestead entry had attached to the land through O'Donnell's improvements, and homestead claim, to which they had become successor; and by reason of which the land was exempt from selection. Whether Thurston may hold what he acquired from the railroad through cancellation of its selection is foreign to the issue. That the appellants may invoke the equitable side of the court and recover the land of Thurston is supported by very able authority, to which they are in no wise strangers.

When the Land Department decided that O'Donnell had initiated a homestead right, existing at the time the selection was placed, there was no longer a contest between the parties as to its superiority or priority. That question was settled.

Donohue vs. St. Paul M. M. R. R. 210 U. S. 21.

When O'Donnell's entry was established, the question then before the Land Department was,

"Who was entitled to the O'Donnell succession?" As between the railroad company and Thurston it became conclusive it might have been one or the other, but the decision binding between them would not be a limitation upon respondents' rights as the prior transferee of the O'Donnell settlement from Thurston; nor was it within the legal power of the Land Department to say that because, as between the conflicting claims of the railroad company and Thurston it had decided the latter to be the owner of the O'Donnell improvements, respondents were concluded from establishing their rights as the successor of O'Donnell through Thurston.

Unita Tunnel Co. vs. Creede Supra.

V.

Further, as to the owner of the improvements having the superior right to acquire the land: It is well settled both by the plain language of the statute and an unbroken line of decisions that the improvements upon which the homestead claim arises, (and without which it could not exist) must be located upon some part of the land sought to be acquired, or there must have been good faith belief on the part of the claimant that such improvements were upon the

lands sought, and in fact were so close to it as to justify the legal conclusion that the belief was founded in good faith.

Ferguson vs. McLaughlin, 96 U. S. 174.
Donohue vs. St. P. M. &M. R. R. Supra
Guytown vs. Prince, 2 Land Dec. 143.
Re. Harten 10 Land Dec. 130.
Re. Parker, 8 Land Dec. 547.
Re. Bowen, 41 Land Dec. 424.

It is very apparent Thurston was not seeking to recover the land upon which the improvements were made by O'Donnell. He says, "I drops this 40 and takes up another where my house stands." He had long ago parted with the improvements and location made by O'Donnell; he stood before the Land Department with the declaration that he was seeking to recover for improvements made upon other lands —of itself, notice sufficient to arouse suspicion that he had not then the improvements made by O'Donnell, and if he concealed the fact that he had entirely parted with their ownership, and the rights which went with them, his craftiness does not alter the rules of law, to defeat the true owner.

The foregoing authorities are all cited with approval as the law and controlling the principles for

which we contend in, and are expounded in—

Great Northern Railway Co. vs. Hower,
236 U. S. 702.

This last case went from the Supreme Court of the State of Washington. It is decisive of the issues presented here. We invite the court to read and apply the authorities there cited both from the Land decisions and the Supreme Court of the United States. If the ruling in that case, favorable to appellant, who was plaintiff, its converse must be true and respondents' contention upheld here.

In St. Paul M. & M. Ry. vs. Donohue: That case was based upon the identical script involved in selection 44 (at bar). Donohue was the successor of the original entryman. The Land Department decided that the script location intervened upon the filing of the relinquishment of the first settler, to the exclusion of his grantee. The Supreme Court passing upon the point says:

> "The Railway Company was confined in its selection of indemnity lands, to lands, non-mineral—not reserved, and to which no adverse right or claim shall have attached or have been initiated at the time of making such selections."

Subsequently the court, in more vigorous terms, said:

"The plain effect of the settlement made upon the land here in controversy before any valid selection of the same land by the railroad company, under its grant, was to initiate a homestead right; that settlement and possession continued from the time it was first made, and when * * * the railroad company, or its successor in title, attempted to select that land as indemnity land, the land was in the actual occupancy of Forseyth, claiming it as a homestead. It had by such settlement been segregated from the lands subject to selection * * * the rights of one settling in good faith for the purpose of claiming a homestead relates back to the date of settlement * * * If, at that date, this land was actually occupied by one qualified under the law, who had entered and settled thereon before that time, with the intent to claim as a homestead, the land had ceased to be public land, and as such subject to selection as lieu land."

Osborn vs. Froyseth 216 U. S. 571-576.

A survey of the authorities discloses a uniform rule; that where settlement has preceded the selection of land by railroad companies, and the granting to such companies of lands in place, under the original grant, lands *actually occupied* are excepted from the grant, or the selection as the case may be. Where a settler had occupied public lands within the odd numbered section granted to the Northern Pacific Railroad, and while occupying the property, after the grant was made, he assigned his improvements

to another, and the other applied for patent; after the land had been surveyed, it was held that the latter was entitled to acquire the land, over any claim of the railroad company, though its line of road was definitely fixed at the time the latter obtained possession from the original settler.

N. P. R. R. Co. vs. Trodick 221 U. S. 209.

Inasmuch as the settler's rights begin with the original settlement, and he has a right to settle on unsurveyed as well as surveyed land, it must follow that neither the original survey, nor the subsequent adjustment of such a survey, can limit his right to acquire the title. It would seem, and is conclusively shown, that he can take the land he occupies, when the survey is made, whether such survey places it in one or another section. Adjustments and readjustments of surveys do not move the surface of the ground. The ground remains stationary, and what is occupied never leaves the power of the settler to take, nor abridges his power, either to take or transfer.

There is no statute, nor are we advised of any decision of the United States Supreme Court, or the appellate courts, restoring to the railroad companies, or vesting them with the right to take in lieu, lands

upon which a homestead right has been initiated. These lands always remain open to the *next settler.*

Reviewing legislation making donations to the railroad companies, without exception the reservations are identical in meaning if not in language, and have been uniformly so construed. The grant in aid of the Northern Pacific R. R. which may be taken as an example provides that it should take every alternate section,

> "not reserved, sold, granted or otherwise appropriated and free from preemption or other claims, or rights at the time the line of road is definitely fixed."

Under the grant of indemnity lands, and the statute under which the defendant claims title, the selection was limited to

> "Land not reserved and to which no adverse right shall have attached or been initiated at the time of making such selection."

Both these statutes accomplish the same result and have been repeatedly analyzed by the Supreme Court of the United States.

In a case which arose under the original grant to the Northern Pacific Railroad, one Lamline was occupying a quarter section of land in Montana at

the time the R. R. Co. filed its map of definite location, July 6, 1892. His settlement had dated from 1877, and he intended it as his homestead. He died in 1891. A short time prior to his death he sold the improvements he had made on the land to John Trodick, who took possession of the land on the death of Lemline. The land was not surveyed till August 10, 1891, and Trodick made his application for homestead entry January 10, 1896, something more than five years after the survey. The Land Department held

> "That since Lemline had no claim of *record* and the *claim of Trodick had its inception subsequent to the definite location of the road,* it must be held that the land inured to the grant."

The title to land passed by patent to the R. R. Co. who sold it to others. Trodick then brought his action to have the patentee declared a trustee for himself, and his title quieted. The District Court dismissed his bill; an appeal followed to the Circuit Court of Appeals of the 9th Circuit. That court reversed the District Court and the patentee appealed to the Supreme Court of the United States. That court says:

> "The lands * * * at the time of definite location of the lines, were occupied by a home-

stead settler * * * Lemline we have seen, was in actual occupancy of the land as a homestead settler when the R. R. Co. definitely located its line. Therefore the lands *did not pass* by the grant of 1864 *but were excepted from its operation* and no right of the R. R. was *attached* to the land when its line was definitely located."

N. P. R. R. vs. Trodick Supra.

Further along the court says:

"It must be taken that by reason of Lemline's actual occupancy as a bona fide homestead settler, at the time of definite location of the R. R. line, these lands were *excepted from* the *grant* and the R. R. Co. did not acquire and could not acquire any interest in them by reason of *such location.* So that the issuing of a patent to it in 1903 based on *such location* was wholly without authority of law. So far as the R. R. Co. was concerned, the way was open to Trodick who had purchased the improvements from Lemline and was in actual possession of the lands as a residence, to carry out his original purpose to make application to enter them under the homestead laws, and thus acquire a full technical title in himself. He made such an application in 1893, the R. R. Co. not having at that time any claims whatever upon the land, for it acquired nothing as to these lands, by definite location of its line * * * He was entitled under the circumstances, having made his application in proper form, and the R. R. Co. having acquired no interest under the definite location of its line, to wait until the land was surveyed, and in the meantime, to stand upon his occupancy, accompanied as such occupancy was, with a bona fide

intention to acquire title, and to reside upon the lands. His claim on the land could not be postponed or defeated by the fact that the R. R. Co. has assumed, without right, at a prior date, to assert a claim to the lands as having passed by the grant and to have become its property, on the definite location of its line."

N. P. R. R. vs. Trodick, supra.

"The land office incorrectly held that the company was entitled to a patent. That was an error of law which was properly corrected by the reversal in the Circuit Court of Appeals of the decree of the Circuit Court with directions to render a final decree recognizing Trodick's ownership."

Id.

In the Whitney case, a claim for indemnity and lieu selection the facts were that one Turner, on the 8th day of May, 1865, filed a claim of soldier's homestead, but never in fact occupied the land, either by himself or his family. On September 30, 1872, the entry was cancelled. On the 7th day of March, 1867, the R. R. Co. made its selection. On the 7th day of May, 1877, Whitney filed upon the land as homestead entry. The R. R. Co. brought an action to have the patent, which had been given Whitney, declared a trust. The trial court decreed that the entry of Turner was void; that the grant to Whitney was unauthorized and of no effect; and entered a decree

in favor of the R. R. Co. The Supreme Court of Minnesota reversed that decision, and a writ of error was taken to the United States Supreme Court. Turner's entry was made a year and ten months prior to the R. R. selection.

The cancellation of Turner's entry was made approximately five years later, and the Whitney entry was made five years later still. The Supreme Court says:

> "The question presented for our consideration is whether, upon the facts admitted, the homestead entry upon the land in controversy excepted it from the operation of the land grant under which plaintiff in error (the railroad company) claims title." After quoting extensively from authorities, it says: "Turner's homestead entry excepted the land from the operation of the R. R. grant, and upon the cancellation of that entry, the tract in question did not inure to the benefit of the company, but reverted to the government and became a part of the public domain, subject to appropriation to the first legal applicant."
>
> *Hastings & R. R. Co. vs. Whitney,* 10 Sup. Rep. 112.

The Court cites in addition the principle laid by it previously:

> "That lands originally public, ceased to be

public after they have been entered at the land office." Citing:

Wilcox B. Jackson, 13 Pet. 498;
Witherspoon P. Duncan, 4 Wall. 210.

An action for damages for breach of warranty of the R. R .Co.'s conveyance, under the grant made to the Union Pacific Ry. Co. identical in meaning with other grants: "Miller made a homestead entry on the land July 25th, 1866, the line of definite location was filed September 21, 1866, two months later." After Miller entered the land, he continued to reside there until the spring of 1870, when he *abandoned* his homestead claim, and *bought the land of the Railroad Company.* He then conveyed his interest to one *Lewis Dunmeyer;* then the Miller homestead entry was cancelled with Dunmeyer's consent, and a third party, *C. B. Dunmeyer,* made a homestead entry which the Land Department held to be valid. The Court says:

> "It is argued by the company that although Miller's homestead entry had attached to the land within the meaning of the excepting clause of the grant before the line of definite location was filed by it, yet when Miller abandoned his claim so that it no longer existed, the exception no longer operated, and the land reverted to the company; that the grant, by its inherent force

reasserted itself and extended to, or covered the land as though it had never been within the exception. We are unable to perceive the force of this proposition. * * * No attempt has ever been made to include lands reserved to the United States, which reservation afterwards ceased to exist, within the grant, though this road and others with grants in similar language, have more than once passed through military reservations for forts and other purposes, which have been given up or abandoned as such reservations, and were of great value. Nor is it understood that in any case where lands had been otherwise disposed of, their reversion to the government brought them within the grant.

"Why should a different construction apply to lands to which a homestead or pre-emption right had attached? Did Congress intend to say that the right of the company also attaches, and whichever proved to be the better, should obtain the land? * * *.

"It is not conceivable that Congress intended to place these parties as contestants for the land with the right in each to require proof from the other to complete performance of its obligations. Least of all, is it to be supposed that it was intended to raise up in antagonism to all the actualsettlers on the soil whom it had invited to its occupation; this great corporation with an interest to defeat the claims and to come between them and the government as to the performance of their obligations.

"The reasonable purpose of the government undoubtedly is that which is expressed, namely, 'While we are giving liberaly to the R. R. Co. we do not give any lands we have already sold,

or to which according to our laws, we have permitted a pre-emption or homestead right to attach. No right to such land passes by this grant. No interest in the R. R. Co attachs to this land or is to be founded on this statute. Such is the clear and necessary meaning of the words, that there is granted every alternate section of odd numbers to which these rights have not attached. It necessarily means that if such rights have attached, they are not granted.' "

Kans. P. R. R. Co. vs. Dunmeyer, 113 U. S. 620.

FURTHER AS TO O'DONNELL'S RESIDENCE

While appellants assert the proceedings in the Land Department are not available as probative facts in respondent's behalf, they quite liberally use them for their own purpose. We believe them equally available to respondents, and as they are in evidence without objection they carry their own weight—effective on all points to which they apply.

In the contest waged between Thurston and the appellant, for the Thurston settlement, (Rec. 113 to 208) the residence of O'Donnell was established; his right to and qualification for settlement fully determined. The appellant was a party to that proceeding and bound by that decision.

If, however, we are mistaken in that, no one knew better than O'Donnell where he resided, and he explicitly says he was residing on the land on the 9th of May, 1902, when the selection was attempted (R. 159). The cabin was completed and occupied in March, 1901 (R. 140 and in 1903, Id. 141, 150), occupancy continued up to October 22, 1906 (R. 158, 159, 244). That fall Thurston relinquished to Beebe.

If on May 9th, 1902, O'Donnell was residing on the land, intending to acquire it as a homestead, the selection did not and could not attach. The argument that if the land was afterward abandoned or reverted to the United States, by relinquishment, the selection would intervene, flies in the face of the decision in *St. P. M. & M. R. vs. Donohue supra* and *Forseyth vs. Same, supra.*

Both those cases arose from an attempt to enforce the identical lieu selective script as at bar; both where the original settler had sold his improvements to the claimant, and the entry had been declared abandoned by Departmental decision; and in each case the claimant sought to acquire the land under differing entries than contemplated by the original settler.

Appellants say O'Donnell abandoned his entry;

in the next paragraph it is asserted he never relinquished it, and claimants under him could not for that reason prevail. Well, if he had a settlement to abandon, he left what appellant could not take; if he never relinquished, his entry still precludes appellants. The sensible construction is to say that since the settler takes by settlement, he relinquishes by sale or transfer to the next settler; not by actual record in the Land Office. The transfer to Thurston operated exactly as if it had taken place after entry at the Land Office, and a written relinquishment filed; in each instance the "next settler" entered; in one by settlement, in the other by filing; in both the results were the same.

We might rest on this point alone, but appellants seem so sincere in asserting, 1st, that O'Donnell never entered, and 2nd, he never abandoned, that we will notice further: He bought a former claimant, $100.00 out; he placed improvements $150.00; he furnished a house for domestic use; and living supplies; toiled to clear land; ate and slept there; declared it his home; warned others of his holdings, and never acted otherwise than as proprietor. If he was doing this as a practical joke, or an enjoyable way of spending his money, he differed materially

from the ordinary young men of his time; so materially indeed that some evidence should be sought showing his intentions were contrary to his conduct. Men usually intend the things they say and do; courts so understand and construe. It will be so in this case. That a sister says she was "too young to understand much about it" (R. 251) and "when my brother had his homestead he made his home practically with us week ends," means little. If made, it is the natural expression of children, whether babes or grownups to call the parental domicile home. Old as we are, we speak of the residence of our parents as home; though maintaining a domicile of our own. Sayings of that kind don't overcome a man's conduct. The same argument applies to the voting suggested—mere guesses—the only positive fact drawn from the witness was, "Father told him not to fight the script; up to that time he claimed it as a homestead." (R. 251.)

There is no other evidence tending to show abandonment, and in as much as he asserted his right until his sale to Thurston, we think residence was fully established, without invoking the adjudication of the Land Department in his favor.

THE EXTENT OF LAND TAKEN

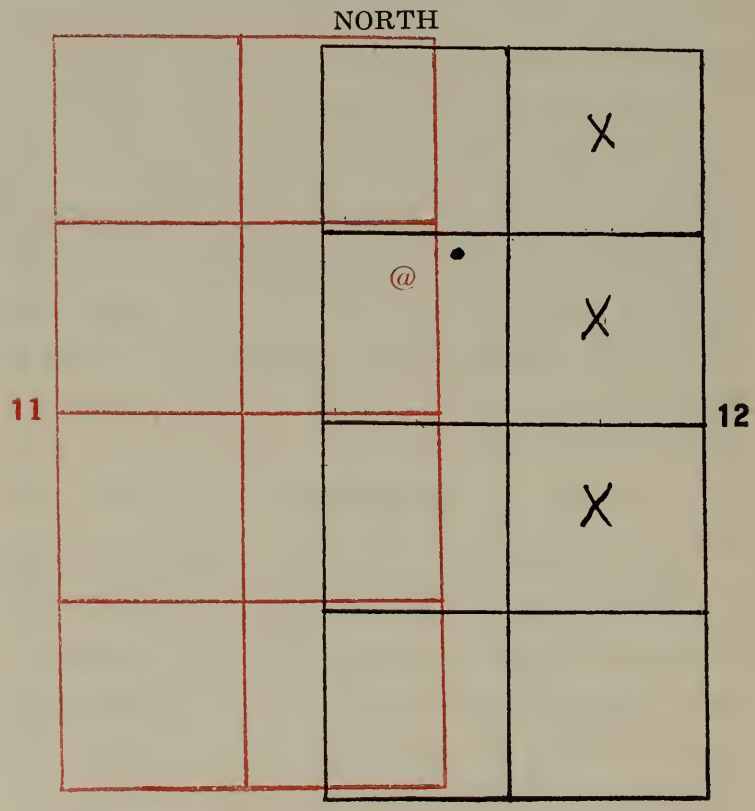
In ordinary parlance "homestead" means the entry of 160 acres of the public lands for the purpose of acquiring title to it. It carries the right to adjoining lands equaling 160 acres. It is significant that selectors, under lieu land claims, always assert the settler must be confined to the single subdivision whereon his improvements are found. The ardor of this argument springs from the fact that the selection usually covers, not alone the land on which the improvements are situated, but all surrounding land from which the settler might take. The same argument was made in the Donohue case *supra* with the decision adverse to the contention. We rest on that case.

SURVEYS

Two descriptions are shown locating the situs of the land claimed, owing to differing surveys, made at different times. A map or plat is submitted which illustrates the overlap of the second survey, and the location on the ground of the improvements upon which the respondent relies with reference to both surveys. This map shows that whether the description is read from the old survey or the accepted

survey, the improvement which initiated the homestead claim is situated within the lines of both; applicable alike to either for finding the ground entered upon. This map is here shown.

RED— Old Galbraith Survey E½ 11—
DARK—Official Survey W½ 12



• Present Home.
@ Old Cabin.
X Thurston's Claim.
11 and 12 Center.

The entry of Cole, succeeded by O'Donnell, was for the E½ of E½ of 11, counting by the first survey; it was the W½ of W½ of 12, counting by the official survey. The latter survey located the lines of the sectional boundaries 68 rods west of lines in the former survey. If the element of notice is a factor, which it is not, the locator of the script was notified of the entry. The original entry was in accordance with an authorized but rejected survey. When the official subsequent survey came in the land was found to be in section 12. From this conflict, or shifting of the survey, it is argued first, that the Land Department did not decide the respondents' claim on the location of actual settlement, but on the "situs of his homestead"; second there were no improvements on the situs, and no homestead attached. If the first prevails the Department erred in deciding a question of law on undisputed facts; if the second prevails it erred in attributing facts contrary to law.

The evidence is all one way that the land settled upon by the entryman is the land claimed by respondents; its situs has never been disturbed; it lies exactly in the same place, whether discovered by the rejected survey or the accepted survey. Start with either and follow along and you arrive at the same

spot on earth. It was a piece of earth settled upon, resided upon, never moving, that held the settler. He had his situs where he pillowed his head, and if the Land Department shifted from that place it left the facts and fluttered into dreamland. It fell into error in attempting to move the settler's only right to patent.

There has never been a moment when the situs of the homestead was severed from the E½ of E½ of 11 by the old ,and W½ of W½ of 12 by the new survey.

Further, the life of a settlement depends, as so admirably depicted in appellant's brief, upon residence and improvement on some portion of the land entered; so that all parts unite; and the improvements must be included in the portion taken when patent is asked. This is the holding in *Great Northern Ry. vs. Hower,* 236 U. S. 702. There the settler claimed and improved the land sought; he did not claim, and did not seek a 40-acre subdivision lying btween his resident situs and his "homestead situs." The residence situs prevailed. If the law favored the railway in that case, it must favor respondents at bar. We approve it in all its reasoning; it excludes the Thurston claim and upholds respondents.

Those cases cited by appellant showing the allowance of the entry, though the improvements were not on the land, are quite distinct. In each case where the entry was permitted, the line of survey was so close necessarily the mistake was an inadvertance, within the reasonable belief that it was actually on the land sought. In no case has the courts or Department ruled that final proof was acceptable, where the distance between the improvements and the land applied for was as great as in the Thurston claim. Thurston could not have been mistaken; he had sold that claim to Beebe, and knew respondents were occupying it.

It is respectfully urged no objection can prevail for want either of residence on the part of O'Donnell; the location of the homestead situs; the location of the improvements, or the quantity of land to be recovered.

THE RIGHT TO CONVEY

Adverting to the contention that the settler shall lose his rights of entry and settlement, if he sells his holdings, it is not believed appellants are sincere in trying to fit the facts in this record to *Bailey vs.*

Sanders, 228 U. S. 603. It is only by pure imagination such an accusation finds place in this record. It is primer class law that a settler cannot transfer the title to public land, nor convey an interest in the fee as against the United States and its grantees. But, as to all others he is owner, and holds in his own right. He may resist its invasion and trade on its value. If he relinquishes his rights by either method available, his grantor gets no title in the soil, but is not disqualified from succeeding as a settler and will be protected in his effort to do so. If he refuses or fails in that, the entry is open to the next applicant. The right to sell his improvements, and his relinquishment has long been recognized as part of our land system, and upheld in practice.

Catholic Bishops vs. Gibbon, 158 U. S. 155.

St. P. M. & M. R. R. vs. Donahue, Supra.

The clear right and active equity of this case are in the respondents; they stand in privity, and assert the rights of the United States to this land. They are bona fide settlers, coming clean handed, asking they be given what they have earned. They are depriving no one of anything not rightfully theirs. They have deceived no one; they have injured no one.

It is respectfully submitted the decision of the lower court is sustained by every test of law and righteousness and should be affirmed.

Respectfully,

S. M. Bruce,

Solicitor for Respondent.

First National Bank Bldg., Bellingham, Wash.